Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions of the	)	CC Docket 96-98
Telecommunications Act of 1996	)	
	)	
	)	

JOINT REPLY COMMENTS OF THE ASSOCIATION OF LOCAL TELECOMMUNICATIONS SERVICES, CBEYOND COMMUNICATIONS, LLC, E.SPIRE COMMUNICATIONS, INC., KMC TELECOM, NET2000 COMMUNICATIONS SERVICES, INC., NUVOX, INC. AND XO COMMUNICATIONS, INC.

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The Association for Local Telecommunications Service ("ALTS"), Cbeyond Communications, LLC ("Cbeyond"), e.spire Communications, Inc. ("e.spire"), KMC Telecom ("KMC"), Net2000 Communciations, Inc. ("Net2000"), NuVox, Inc. ("NuVox") and XO Communications, Inc. ("XO") (collectively, the "Joint Commenters"), by their attorneys, submit these reply comments in response to the Commission's Public Notice requesting comment on the use of unbundled network elements ("UNEs") to provide exchange access service.[1]

I. SUMMARY AND INTRODUCTION

The comments filed in the initial round of this proceeding overwhelmingly reveal that the all out war on local exchange competition being waged by ILECs shows no sign of abating. Indeed, the Bell Operating Companies ("BOCs"), emboldened by the success of their

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[1] *See Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, Public Notice, DA 01-169 (rel. Jan. 24, 2001) ("*Public Notice*"); *see also Common Carrier Bureau Grants Motion for Limited Extension of Time for Filing Comments and Reply Comments on the Use of Unbundled*

campaign to stymie the deployment of enhanced extended links ("EELs") in defiance of the Commission's orders, have opened a new front in the war by asking the Commission to withdraw from its list of available unbundled network elements ("UNEs") unbundled high capacity loops and unbundled transport.[2] The *BellSouth Petition* to eliminate high capacity loops and dedicated transport, filed by the incumbent local exchange carriers ("ILECs") on the same day as initial comments in this proceeding, attempts to divert the Commission's attention from the fact that for over a year and a half, the ILECs have succeeded in perverting and circumventing the Commission's rules requiring them to convert special access circuits to EELs. Instead, the ILECs shift the debate, and argue that an allegedly competitive market for special access obviates the need for EELs. In fact, in their initial comments in this proceeding, only one of the ILECs, Qwest, asserted that it had, in fact, complied with the Commission's EEL conversion rules. The reason for this is simple: as evidenced by the initial comments of competitors in this proceeding, the ILECs have ignored the Commission's EEL orders.

Despite the ILECs' best attempts to obfuscate the issues, the initial comments filed by competitors in this proceeding substantiate the experience of the Joint Commenters, whose attempts to convert special access circuits to EELs have been stopped dead in their tracks by illegal ILEC "pre-audits" of special access circuits, random attempts to impose restrictions

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Network Elements to Provide Exchange Access Service, CC Docket No. 96-98, Public Notice, DA 01-501 (rel. Feb. 23, 2001).

2 *See Pleading Cycle Established For Comments on Joint Petition of BellSouth, SBC and Verizon*, CC Docket No. 96-98, Public Notice, DA 01-911 (rel. April 10, 2001); *see also* "*Common Carrier Bureau Grants Motion For Extension Of Time For Filing Comments And Reply Comments On BOC Joint Motion Regarding Unbundled Network Elements*, CC Docket No. 96-98, Public Notice, DA No. 01-1041(rel. April 23, 2001) ("*BellSouth Petition*"). The Joint Commenters do not attempt to address to merits of the BellSouth Petition here, but instead will file comments with the Commission on June 10, 2001.

and surcharges, and by the ILECs' refusal to come into compliance with the Commission's EEL orders and complete requested EEL conversions without delay. The record reveals that other competitive carriers agree with the Joint Commenters, that the Commission's so-called "co-mingling" rules must be clarified to address the abusive ILEC interpretations of those rules, which assert that CLECs must operate separate, overlapping networks for DS1 traffic and DS3 traffic. Moreover, the record demonstrates that the Commission must re-examine its EEL rules to realize the original policy goals that underlie the Commission's EEL rules—the balancing of the right CLECs have to obtain combinations of high capacity loops and transport to advance local competition with the perceived need to prevent special access arbitrage by IXCs.[3]

As the Joint Commenters demonstrated in their initial comments, and as echoed by other competitors, in order for CLECs to make effective use of EELs to deploy competitive services and technologies the Commission must eliminate delays and artificial/unlawful restrictions that have precluded deployment of EELs to date. The Commission should take this opportunity to clarify that ILECs may not engage in pre-audits of CLEC EEL conversion orders, and should find that an ILEC that engages in a pre-audit of EEL eligible circuits violates the Communications Act. The Commission also should pronounce as unlawful a host of barriers and restrictions, including retroactive application of "Leaky PBX Surcharges" and zone-boundary crossing restrictions, the ILECs have attempted to impose on carriers seeking to convert special

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[3] The Joint Commenters respectfully note that preserving ILEC revenues is not one of the stated goals of the Act and ILEC revenue neutrality is not the statutory standard governing unbundled access to UNEs or combinations thereof.

access circuits to EELs. The Commission also should clarify that its orders permit CLECs to convert to EELs those DS1 circuits multiplexed onto DS3 circuits without regard to the other traffic carried on a DS3 (or other tariffed service), and find that ILECs may not attempt to unlawfully deny the eligibility of such DS1 circuits for conversion from special access to EELs. Finally, the Commission should enact nationwide EEL provisioning intervals and quality of service guidelines. To the extent that the Commission decides to adopt any restrictions on the use of EELs, they must be designed to protect the interstate special access/universal service support structure—the original goal of the restrictions—and not to restrict the ability of CLECs to provide broadband/data and bundled service offerings over EELs.

II. THE RECORD REVEALS THAT ILECS UNILATERALLY HAVE IMPOSED ILLEGAL RESTRICTIONS AND ARTIFICIAL PROVISIONING BARRIERS ON EELS

The initial comments in this proceeding unequivocally demonstrate that ILECs have thrown up artificial and anticompetitive barriers and manipulated the Commission's EEL rules to effectively preclude EEL conversions requested by CLECs, effectively refusing to comply with the letter or spirit of the Commission's EEL orders. Such behavior has come to be expected from the BOCs, and not just by CLECs. Indeed, the general public has now become attuned to the anti-competitive tactics for which the BOCs are notorious in the telecommunications industry, to such an extent that they were the subject of a *USA Today* editorial last week![4]

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[4] *"Public Pays Price As Baby Bells Stifle Competition,"* USA Today, p. 11A, April 25, 2001. http://www.usatoday.com/usaonline/20010425/3262912s.htm.

The initial comments submitted by competitive providers in this proceeding reflect experiences similar to those described by the Joint Commenters in their initial comments. That is to say, across the board, ILECs have impeded access to the EEL by conducting illegal pre-audits of CLEC circuits, imposing illegal barriers and restrictions, and failing, in large part, to even establish the necessary procedures and systems for converting circuits to EELs and ordering new EELs.

A. ILECs Continue to Engage In Illegal Pre-Audits

ILECs continue, to this day, to undertake illegal pre-audits of CLEC EEL conversion requests. Global Crossing, for example, indicated that Qwest, despite its assertion that it has fully complied with the Commission's *Supplemental Order Clarification*,[5] undertook a pre-audit of the circuits that Global Crossing sought to convert.[6] Predictably, ILECs place the blame for their failure to comply with the Commission's EEL rules at the feet of CLECs, who they argue have sought to convert circuits (identified in the illegal ILEC pre-audits) that do not comply with the Commission's EEL rules.[7] This circular argument has no merit and ignores the fact that the Commission has established an audit procedure – one that does not take place prior to conversion. Indeed, the record shows that Qwest and its siblings continue to ignore the

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5 Qwest Comments, 18.

6 Global Crossing Comments, 12.

7 Qwest Comments, 19.

provisions of the Commission's rules that do not appeal to them. This sort of activity must be curbed. The record makes clear that the Commission must affirm and enforce its prohibition on pre-conversion audits.

B. ILECs Continue to Erect Barriers and Impose Random Restrictions

Besides conducting illegal pre-audits, ILECs have imposed or attempted to impose a seemingly ever-changing array of unlawful barriers and restrictions designed to inhibit competitors' access to EEL conversions and new EELs. BellSouth, for example, has informed at least one of the Joint Commenters that the conversion of special access circuits to EELs will trigger retroactive application of a "leaky PBX" surcharge of $600 per month per DS1 circuit. Clinging to the ways of its monopoly past, BellSouth maintains this position despite the fact that it does not provide local dialtone on any of circuits involved and is thus not missing out on any access charge revenue it might have earned for use of the "Bell System" PSTN. The financial barrier created by the potential imposition of retroactive leaky PBX surcharges has delayed, stalled or derailed the conversion of special access to EELs across the BellSouth territory. Thus, the Commission affirmatively must deny the ILECs' attempts to misapply the antiquated leaky PBX surcharges as a means of imposing higher costs on their competitors and foreclosing access to EELs.

Another unlawful gambit used by BellSouth to inhibit competitors' access to EELs is the imposition of cross-zone restrictions on EELs. BellSouth's current policy is that it

will not provision new EELs that cross zone boundaries.[8] The Joint Commenters request that the Commission clarify that any ILEC availing itself of the circuit switching unbundling exception must make EELs available, even if the transport component of such EELs extends into another density zone. Once again, it seems that the Commission must remind ILECs that its rules prohibit them from unilaterally imposing restrictions on access to UNEs and combinations thereof.

C. ILECs Have Failed to Implement EEL Ordering and Provisioning Procedures That Comply With the Commission's Orders

The record also demonstrates that ILECs have failed to establish procedures that they claim are necessary to process EEL conversions or provision new EELs. As the Joint Commenters and several other commenters observed, in its *Supplemental Order Clarification*, the Commission required that the EEL conversion process be simple and that conversions be accomplished without delay.[9] Immediately following the effective date of the Commission's EEL rules, ILECs, such as SBC, cited "technical" problems and a lack of internal procedures as the reason that they could not immediately provide EEL conversions. Yet, Qwest has admitted that "all that is required to convert a special access circuit to a UNE is a billing change."[10] Nonetheless, Focal's EEL conversion orders with SBC fell victim to the same illegal

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8 BellSouth has elected to avail itself of the circuit switching unbundling exemption in markets that qualify for the exemption. In addition, the Georgia Public Service Commission has established a pro-competitive policy that requires BellSouth to provision new EELs on a statewide basis.

9 *Supplemental Order Clarification*, ¶ 30.

10 Qwest Comments, 8.

"disconnect/reconnect" process that plagued one of the Joint Commenters.[11] As a result, not a single special access circuit conversion order submitted by Focal has been converted.[12] To rectify this problem and to encourage the ILECs to devote the resources necessary to ensure compliance with the law, the Commission should clarify that the conversion from special access to UNE pricing becomes effective with the submission of a written or electronic request for conversion.[13]

In sum, the Joint Commenters submit that it is essential that the Commission ensure that ILECs cannot hamstring EEL deployment by pre-auditing the circuits that CLECs seek to convert to EEL pricing, or by establishing other criteria that are inconsistent with the rules adopted by the Commission.

III. THERE IS STRONG SUPPORT IN THE RECORD FOR CREATION OF NATIONAL EEL PROVISIONING AND QUALITY STANDARDS

In their initial comments the Joint Commenters proposed that, in light of the importance of EELs to the furtherance of local competition, the Commission should establish national provisioning standards to govern the ILECs' obligation to provide EELs by a date certain and without "negotiation" of a due date, or difference in quality of service from what the

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11 Focal Comments, 6.

12 *Id.*

13 The Commission also should act to ensure that the ILECs augment their electronic systems to facilitate the conversions of special access circuits to EELs and the provisioning of new EELs.

ILEC provides to itself.[14] As the Joint Commenters and other competitors noted in their initial comments, CLECs already have suffered widespread financial losses in the form of overcharges and termination penalties, not to mention network inefficiencies, by being required to pay for loop and transport combinations at the higher special access rates rather than the UNE rates for EELs due to the refusal of the ILECs to comply with the Commission's rules.[15] In order to address the disparities in both provisioning intervals and circuit quality between special access and EEL circuits, the Joint Commenters again submit that the Commission should find that the provisioning intervals and quality of service metrics governing special access also apply with equal force to EEL circuits.

The ILECs' efforts in obstructing access to EELs proves that the adoption of such national standards is necessary. BellSouth, for example, requires negotiation of all special access conversion due dates. Moreover, BellSouth currently imposes a 20 business day provisioning interval (plus firm order commitment interval) on new EELs (incorporating a DS1 loop), even though the identical product, if ordered as a special access service typically gets provisioned in 5 or 8 business days. Notably, BellSouth does not even attempt to address its compliance (or lack thereof) with the Commission's EEL rules in its initial comments.

Qwest, the only BOC to address the issue in its initial comments, dismisses competitors' quality concerns, and asserts that there "is no evidence" that the ILECs' high capacity special access service is of superior quality to UNEs, and states that "if such a quality differential does exist, it is because of factors unrelated to any incumbent LEC residual power in

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14 Joint Comments, 16.

15 *Id.*, 15; Focal Comments, 11-12.

local exchange markets."[16] In fact, CLEC complaints cited above provide ample evidence of ILEC delays and CLEC service quality concerns. Regardless, Qwest's confidence in the quality of its UNE product is reassuring, and accordingly, Qwest and the rest of the BOCs surely should have no objection to the establishment of national provisioning intervals and quality of service standards. Moreover, the Joint Commenters urge the Commission to adopt standards so as to ensure that the ILECs complete EEL conversions in a timely manner, and without delay as previously ordered by the Commission. In addition, the Joint Commenters urge the Commission to require ILECs to provision new EELs at parity with comparable special access services. The ILEC practice of building a month or more delay into the provisioning of new EELs inhibits competitors' reliance on EELs and keeps their costs artificially high, as they must continue to order special access in order to provide timely service to their end user customers.

Besides timely access to EELs, the Joint Commenters agree with Focal that quality product is a "must" as well, and urge the Commission to take steps to prevent ILECs from providing CLECs with inferior quality UNEs as "punishment" for converting circuits. As indicated above, the Commission must affirm that the EEL conversion process does not result in a disconnect order issued to ILEC field technicians. The conversion process must not be allowed to affect consumers by taking their phone service down. New EELs should be provisioned at the same level of quality as comparable special access circuits. EELs are as important to the deployment of advanced services and other telecommunications services as collocation. Accordingly, the Commission should adopt national provisioning intervals and quality of service

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[16] Qwest Comments, 14.

standards in order to make EELs available to all competitors, provided the CLEC certifies that the circuit qualifies for conversion under the Commission's rules.

IV. THE RECORD SUPPORTS ADOPTION OF ONLY VERY NARROW EEL RESTRICTION RULES NECESSARY TO ACHIEVE THE GOAL OF PREVENTING ARBITRAGE IN THE IXC MARKET

As discussed above, the Commission's significantly local use restrictions on EELs—originally contemplated as a way to advance local competition while preventing IXCs from using EELs solely to carry circuit switched interexchange traffic—were subsequently misunderstood and misinterpreted by ILECs as applying to the entire circuit, as opposed to only the loop component (typically a DS1). ILECs continue to ignore CLECs' self-certifications that such DS1 circuits are eligible for conversion, and insist that each and every channel on a carrier's multiplexed high capacity interoffice transport circuit meet one of the safe harbors set forth in the *Supplemental Order Clarification*.

A. The Commission Must Clarify Its Rules Governing the "Co-Mingling" of an EEL with a Tariffed Service

Not surprisingly, in their initial comments, the ILECs bypass any meaningful discussion of the actual language underlying the issue before the Commission, and instead undertake lengthy arguments about how "critical statutory goals" will be undermined if co-mingling is permitted. Qwest argues that "split[ing]...a single channel or circuit between two pricing methodologies would be arbitrary and capricious" and that pursuant to application of the impair analysis "it is inconceivable that a scenario would unfold where the ability of a carrier to connect a half circuit UNE to a half circuit tariffed service would conform to the terms of the

Act."[17] Similarly, SBC and Verizon argue that ratcheting would require the creation of a whole "new UNE—individual channels on a DS-1 or DS-3—for which the Commission has never performed an impairment analysis."[18] Both of these arguments are flawed. In fact, Verizon has admitted that there is no real reason not to engage in ratcheting, other than an "emotional impediment."[19] Moreover, the Commission already has concluded that "shared use" of transport facilities and ratcheting of rates for such shared facilities are reasonable and permissible practices.[20] Indeed, the shared use of transport continues to this day and ILECs continue to use ratcheting as a means of billing the appropriate amounts of switched and special access.

Accordingly, the Commission should clarify that the use of high capacity transport for the provisioning of both UNEs and exchange access should be subject to the same "shared use" and ratcheting principles long used by the industry in the context of providing switched and special access services over the same transport facility. As is the case with shared use of a facility for switched and special access, the shared use of transport for UNEs and exchange access would not result in "co-mingling" since each discreet DS1 bitstream would be either exchange access or UNE – never both. Thus, if application of the tried and true shared use/ratcheting methodology were extended to the shared use of transport for exchange access and UNEs, each service would cover its own allocated costs and the Universal Service Fund would not be impacted at all, as no exchange access would be provided at UNE rates.

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17 Qwest Comments, 20-21.

18 SBC Comments, 29.

19 *See Testimony of Verizon Witness Fox,* PA 271 Transcript at 38 (Feb. 27, 2001).

20 *See, e.g., In the Matter of Access and Divestiture Related Tariffs,* Memorandum Opinion and Order, CC Docket No. 83-1145, 97 FCC.2d 1082, 1225, 1282 (rel. Feb. 17 1984).

B. The Commission Should Adopt a Fourth "Significantly Local" Test

The Joint Commenters submit that the Commission narrowly must tailor any EEL use restrictions to clarify that such restrictions are meant to ensure that requesting carriers cannot use EELs solely for the transport and termination of interexchange switched voice traffic. To that end, the Joint Commenters submit that, if the Commission were to continue with its current "safe-harbor" framework, it should adopt a fourth "significantly local" test to govern a circuit's eligibility for conversion to an EEL and UNE pricing. This fourth option is necessary so that CLECs providing innovative bundled service offerings may use EELs to provision such services.

As the Joint Commenters noted in their initial comments, the temporary restrictions now in place governing EELs were adopted to address ILEC concerns regarding IXC use of EELs and its alleged concomitant effect on Universal Service.[21] However, as discussed above, ILEC misapprehension of the EEL rules have precluded EEL deployment almost completely. In order to afford CLECs the ability to obtain EELs in a timely and cost-effective manner, the Joint Commenters submit that the Commission should adopt a fourth "significantly local test" under which carriers could convert special access circuits to EELs if the requesting carrier certifies that the circuit to be converted carries less than 50 percent circuit switched interexhange voice traffic.

Adoption of this fourth "safe harbor" would address all of the Commission's

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[21] Joint Comments, 17.

policy concerns regarding the EEL. First, it would prevent IXCs from converting special access circuits to EELs solely for the purpose of carrying circuit switched interexchange voice traffic—the concern that gave rise to the temporary EEL restrictions in the first instance. Second, the test proposed by the Joint Commenters –in conjunction with the adoption of the Joint Commenter's other proposals in these and their initial comments—would expand the reach of facilities-based competitors' voice and broadband/data services offerings.

V. CONCLUSION

At the end of the day, the ILECs rely completely on policy arguments regarding why they are not be required to convert a CLEC's eligible special access circuits to EELs in compliance with the Commission's effective rules. The ILEC's reliance on the USTA "Special Access" report, which relies heavily on questionable data and lightly supported, and often wrong policy positions and assumptions, strongly suggests that the ILECs themselves know that the Commission's implementing rules cannot be squared to support the ILEC's position. For all of the foregoing reasons, the Joint Commenters respectfully submit that, based on the record before it, the Commission should make clear that: (1) ILECs may not refuse to provide EELs based on pre-audits of eligible circuits; (2) ILECs may not unilaterally impose restrictions or create financial barriers to inhibit competitors' access to EELs; (3) ILECs must provision EELs with intervals and quality that is at parity with comparable special access services: (4) carriers may convert special access services to EELs even if the interoffice part of the circuit continues to

carry special access traffic; and (5) the EEL is available for all carriers, including carriers with data oriented networks.

Respectfully submitted,

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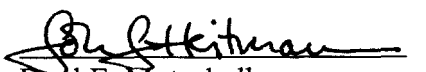
By: 

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CERTIFICATE OF SERVICE

I hereby certify that I have hand-served a copy of the Joint Cbeyond Communications, Inc., e.spire Communications, Inc., KMC Telecom, NET2000 Communications Services, Inc., Winstar Communications, Inc. and XO Communications, Inc. upon all counsel of record as follows:

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